



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED;
MOTION TO DISMISS IN PART FOR LACK OF JURISDICTION DENIED:
June 10, 2010

CBCA 1460

WALSH/DAVIS JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Edward J. Sheats, Jr. of Sheats & Associates, P.C., Brewerton, NY, counsel for Appellant.

Dalton F. Phillips and Leigh Erin S. Izzo, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

DANIELS, Board Judge.

The General Services Administration (GSA) and Walsh/Davis Joint Venture (WDJV) entered into a contract for construction of a building in Washington, D.C., to be occupied by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. Various disputes arose between the parties, and WDJV filed a claim encompassing both direct costs and delay and inefficiency costs. A GSA contracting officer issued a decision on the claim, and WDJV appealed that decision. The parties have resolved all of the direct cost elements of the appeal save one, which is the subject of this decision.

The element with which we are concerned here is a claim for increased costs of the precast concrete which was supplied by WDJV subcontractor Global Precast, Inc. (Global). The claim asserts that due to changes GSA made to the face mix and finish of the precast, Global incurred additional costs of \$435,459.07. With markups of ten percent for overhead and another ten percent for profit, the total amount of the claim is \$526,905.48.

The Board scheduled a hearing on this claim for February 9 and 10, 2010, in Washington, D.C. Unfortunately, during those days, the city of Washington was inundated by a blizzard of snow. Although WDJV's counsel and witnesses had arrived in the city prior to the storm and were prepared to proceed with the hearing, GSA personnel (other than counsel) who were most knowledgeable about the case were unable to make their way to our offices. Consequently, the hearing was postponed. Subsequently, counsel have attempted to secure a decision by inundating the Board with a blizzard of paper -- cross-motions for summary relief; oppositions to those motions; and many affidavits, declarations, and exhibits to the cross-motions and oppositions.

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. At this stage of the process, the judge's function is not to weigh the evidence and determine the truth of the matter, but rather, to determine whether there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The fact that both sides have felt necessary the filing of affidavits and declarations, and counter-affidavits and declarations, should have been a strong hint that genuine issues remain and that a hearing will be essential to finding the truth of the matter. We deny both motions for summary relief.

Within GSA's motion is an assertion that we must dismiss a portion of the case for lack of jurisdiction because that part of the claim currently in question was not presented to the contracting officer for a decision that would be appealable to the Board. We reject this contention because the part in question is based on the same operative facts as the part which was presented to the contracting officer.

Background

Each party has filed a statement of uncontested facts. WDJV's statement of genuine issues makes plain that most of GSA's allegedly uncontested facts are actually contested. Although GSA failed to file a statement of genuine issues, as required by Board Rule 8(g)(3) (48 CFR 6101.8(g)(3) (2009)), its opposition to WDJV's motion makes plain that most of

WDJV's allegedly uncontested facts are actually contested as well. Because of the challenges as to facts of the case, we are limited to reciting here information which is gleaned from documents, affidavits, and declarations submitted by the parties.

The subject matter of our dispute is defined in an affidavit provided by Peter Cicuto, a retired Global employee who was the company's vice president of operations during much of the time period with which we are concerned: "[P]recast concrete consists of a combination of elements. The elements include the coarse aggregate, sand, cement, water, chemical additives and pigment (optional). These elements when combined and mixed yield concrete. The concrete is then poured into molds or casts in our manufacturing plant. Hence the name precast concrete." Affidavit of Peter Cicuto (Apr. 8, 2010) ¶ 12.

The contract directed the contractor to use specific concrete materials for the precast. Appeal File, Exhibit 2 at 03450-6 to -7. The cementitious material to be used was "Portland Cement: ASTM C 150, Type I or Type III, 100% White color." The same type, brand, and source of supply of cement was to be used throughout the project. *Id.* at 03450-7.

Additionally, the contract prescribed two kinds of finishes for the precast, smooth form and acid-etched. Appeal File, Exhibit 2 at 03450-12. The smooth form finish was to be used on the precast for Buildings D, E, and G; the garden wall; and as indicated on the drawings. The acid-etched (or acid-washed)¹ finish was to be used on the precast for Buildings A, B, and C and as indicated on the drawings. *Id.* at 03450-1.

The contract did not specify the color of the face mix, or exterior element, of the precast. In August 2004, WDJV asked GSA for a sample from the architect of the building, Moshe Safdie Associates (MSA), to show the desired color. MSA officials tell us that MSA "provided a sample of Indiana Limestone Standard Grey which we told the contractor to match." Declaration of Moshe Safdie (MSA founding principal) (undated, but filed on May 13, 2010) ¶ 4; Declaration of Rainer Goeller (MSA principal who was responsible for on-site review of the precast plant and the fabricated pieces of precast at the plant) (Apr. 22, 2010) ¶ 3; Declaration of Victoria Steven (MSA project architect for this job) (Apr. 26, 2010) ¶ 3. According to Global's Mr. Cicuto, MSA gave Global a design mix that it wanted for the project, and the mix "would produce a color to match Indiana limestone standard gray." Cicuto Affidavit ¶ 39. Whichever of these versions is correct, the parties agree that in August 2004, the architect desired that the precast have the color Indiana limestone standard gray and the contractor understood that it was to provide precast with that color. Global

¹ The parties have agreed that for the purpose of this appeal, "acid-etched" and "acid-washed" have the same meaning.

personnel state further that gray, such as Indiana limestone standard gray, is industry standard for precast where a contract does not identify the color to be used, and that Global assumed when bidding the job that it would have to supply gray precast. Cicuto Affidavit ¶¶ 34, 37; Affidavit of Donny DiVincentiis (head of sales/estimating for Global who was in charge of manufacturing plant operations for this project) (Apr. 12, 2010) ¶¶ 12-13, 18.

The contract required the contractor to provide sample panels of precast at three separate stages before installing panels on the structure.

-- First, “For each type of finish indicated with approved mixes on exposed surfaces of precast architectural concrete units, in sets of 4, illustrating full range of finish, color, and texture variations expected; approximately 300 by 300 by 50 mm.” Appeal File, Exhibit 2 at 03450-3.

-- Second, after the initial samples were approved, the contractor was to “[p]roduce full-scale sample panels incorporating typical reveals and joint details of each color, texture and pattern, approximately 1.20 m long by 1.2 m high, to demonstrate the expected range of finish, color, and texture variations.” Appeal File, Exhibit 2 at 03450-4. In performing this work, the contractor, “[i]f requested by the Architect, [was to] adjust the pigment color of the panels before proceeding with the mockups.” *Id.* at 03450-5.

-- Third, after the full-scale samples were approved, but before fabricating the precast units, the contractor was to “build a mockup of each type of finish concrete with approved mixes and erect as part of the building exterior envelope mockup.” Appeal File, Exhibit 2 at 03450-5.

Global submitted its first samples to WDJV on October 18 or 19, 2004. These samples were denominated G514. Appeal File, Exhibits 13, 34 at 1; Safdie Declaration ¶ 5. Global intended that these samples match the color of Indiana limestone standard gray. Cicuto Affidavit ¶ 38; Appeal File, Exhibit 15.

As project architect, MSA’s Victoria Steven was responsible for the review of the precast submittals. She consulted with MSA founding principal Moshe Safdie on the review before returning comments to the contractor. Steven Declaration ¶ 26. On November 16, 2004, Ms. Steven gave the following comments on the October samples to Gilbane Building Company (Gilbane), GSA’s construction manager for the project:

We are including with this review response, two additional samples as color references. We would like to see a more uniform coloration with less visible

black flecks at the surface and we would like to see some mica flecks added. The color was very good but Moshe wants to see it ‘warmed up’ a bit, closer to color sample #1. Can we also please see one a few shades towards Color Sample #2 and one a bit lighter than Color Sample #1? The next samples should also have the acid-washed finish.

Appeal File, Exhibit 17. WDJV sent this message to Global on November 17. *Id.*, Exhibit 16 at 1.

On November 26, Global sent to WDJV a second set of samples, six-by-twelve-inch acid-etched pieces of precast which were denominated G688, G707-2, G708, G709, and G710. Appeal File, Exhibits 18, 34 at 1; Safdie Declaration ¶ 6. Again, Global intended that the samples meet the architect’s color requirements. Cicuto Affidavit ¶ 44.

On December 2, Ms. Steven commented to Gilbane:

Of the 5 samples submitted the one marked **G688** is the closest to the preferred finish material. We would still like to see a slightly more uniform coloration with less visible black and dark grey flecks at the surface. The cement color was very good but Moshe would like to see this sample with less visible flecks and also one sample a bit lighter.

Appeal File, Exhibit 20. The following day, WDJV transmitted these comments to Global. *Id.*, Exhibit 21.

On January 18, 2005, Global submitted another sample. Appeal File, Exhibits 23, 34 at 1.

On February 15, Mr. Safdie sent the following electronic mail message to Ms. Steven:

I looked at the precast sample outside our shipping entrance, and feel seeing it out of context and without anything next to it, that it might be too dark. It also does not have a very exciting surface texture, i.e. it doesn’t seem to be as good as any of the acid edge surfaces that we have had. . . .

I’m sure we will need to make a decision soon and we will need to see several materials in relationship to each other on site. I believe that we will need to have at least a couple of limestone samples. On the light side, we could use a Portuguese stone of Savannah, on the darkest side we should use some of the limestones commonly used on the government buildings downtown, which I

believe are mostly Indiana limestone. In the precast sample range, we should also have at least three samples. They should be perfect in terms of their texture and they should range from light, almost like Savannah, and with two positions going darker towards Indiana limestone. When we can see all of this together on the site we will be able to make a decision

Appeal File, Exhibit 25.

On February 21 or 22, a fourth set of samples was provided for review. Appeal File, Exhibits 24 at 2, 34 at 2. All of these samples had an acid-etched finish. They were denominated G720 AE (tan limestone), G722 AE (dolomite sand), 723 AE (400 bell sand), and 721 AE (181 sand). *Id.*, Exhibit 24 at 1. On February 28, Ms. Steven gave Gilbane these comments on the samples:

We were very pleased to see the range of whiteness on the latest samples and here are Moshe's comments: The G688 sample is still leading the selection list, but Moshe would like to see a lighter version w/ less gray. The new samples were very useful for comparison, but Moshe found these whites to be very sterile and cold. Can we see a sample with the gray pigment reduced in the G688 and with some 'warm' tones introduced? By warm Moshe means cream and peach colors. I am enclosing a sample of Olympia Cream from a previous job as a reference for these cream/peach tones we would like to see. The overall brightness of the new sample should be somewhere between the G688 and this Olympia Cream. The Olympia Cream is a color reference only.

Id. On March 2, these comments were provided by Gilbane to WDJV and by WDJV to Global. *Id.* at 3, 5.

On March 7 (and perhaps 9), Global sent a fifth set of samples to MSA for review. Appeal File, Exhibit 24 at 2; Steven Affidavit ¶ 7. These samples were denominated G715 AE (0.50% dark buff pigment), G725 AE (0.25% dark buff pigment), and G726 AE (0.75% dark buff pigment). According to Global's Mr. Cicuto, "Other than the dosage of pigment all samples are made with Duffrin² limestone, tan limestone, and white cement." Appeal File, Exhibit 26.

On March 15, Ms. Steven sent Gilbane the following comments on these samples:

² Spelled "Dufferin" according to MSA's Mr. Goeller. Goeller Declaration ¶ 8.

We were very pleased to see the tonal range on the latest samples and here are Moshe's comments:

- He is leaning towards the G726, but is unwilling to make a final selection based on this small a sample.
- Therefore, could Global please prepare 2 large scale mock-ups (approx. 1M wide x 2M high) on site of both G726 and G715 for final selection.
- If the poured-in-place architectural concrete needs to develop a matching mix before the final precast selection they can use the G715 as a basis for comparison.
- Moshe would also like to see a sample of the lightest Indiana limestone available in the DC area for comparison on site with the final precast samples.

Appeal File, Exhibit 27. These comments were transmitted to Global on the same day. *Id.*, Exhibit 29.

Later in March (the documentation ranges from the 18th to the 29th), Global sent for review samples of G715 and G726, both with acid-etched finish and both having a concrete mix including, according to Global, white cement, fine aggregate (tan limestone), and coarse aggregate ("Duffrin" limestone). Appeal File, Exhibits 31, 32, 34 at 2; Cicuto Affidavit ¶ 53.

On April 6, WDJV's project manager, Vincent Michalesko, wrote to GSA's project manager, Jean Hundley,³ complaining that "[t]he lack of an approved precast mix design has significantly delayed the fabrication efforts of Global Precast and subsequently had a negative effect to the project schedule." Appeal File, Exhibit 34 at 1. Mr. Michalesko continued:

On Tuesday, April 5, these [1 meter by two meters] samples [of G715 and G726] were reviewed by representatives of Moshe Safdie, but were not approved due to scratches on the face of the G726 panel. However, WDJV understands that the approval of the color must come from Moshe Safdie himself. . . . Selection of a precast mix design needs to occur by April 14,

³ Mr. Hundley tells us that he was the contracting officer's representative for this project. Declaration of Jean Hundley (Feb. 24, 2010) ¶ 1. He says that in this capacity, he "was responsible for administration of the construction contract with the authority to give change order directives for amounts up to \$450,000.00." *Id.* ¶ 2.

2005 in order to minimize the construction delays and monetary impacts incurred by WDJV and it's [sic] subcontractor to date.

Id. at 2, 3.

A Gilbane/GSA mock-up inspection form dated April 14 states that the G715 sample was approved for color and general acceptability. The form includes the legend, "'OK' color on south side." A representative of MSA signed the form. Appeal File, Exhibit 35 at 2. The following day, GSA's Mr. Hundley wrote to WDJV's Mr. Michalesko, "Panel #G715 was approved for color and finish." *Id.*, Exhibit 36. An April 22, 2005, MSA shop drawing transmittal states, "The **G715 AE** mix sample for [sic] 'Approved' for use on the project." The transmittal notes that this sample is acid etched. *Id.*, Exhibit 37 at 1, 4. This approval was sent by Gilbane to WDJV on April 26. *Id.* at 2-3. WDJV told Global on April 27 that the G715 sample was approved. *Id.*, Exhibit 38.

According to MSA's Mr. Safdie and Ms. Steven, "The G715 face mix that we approved is remarkably similar to the Indiana Standard Grey Limestone sample we provided to Global Precast in August 2004." Safdie Declaration ¶ 12; Steven Declaration ¶ 11. MSA's Mr. Goeller maintains, as to one of the components in the mix, that the coarse aggregate "conformed to the requirements outlined in the specification which was not changed by the architect." Goeller Declaration ¶ 8. According, however, to Donny DiVincentiis, the head of sales/estimating for Global and the man who was in charge of Global's manufacturing plant operations on this project, "G715 was not a color that matched the required Indiana limestone standard gray color." DiVincentiis Affidavit ¶ 13.

On July 27, Global wrote to WDJV:

A 6' portion of one of the legs for the garden wall will be delivered to the site on the morning of Friday July 29 The sample ex[h]ibits 4 different textures of the 'as cast' ie acid etch; form finish, light sand blast & medium sandblast. Please get architect['s] response.

Appeal File, Exhibit 40; *see also* Goeller Affidavit ¶ 6; Steven Affidavit ¶ 12 (both acknowledging that Global provided at this time samples which included four different finishes). Global's Mr. Cicuto says that he submitted alternate finishes "[b]ecause Mr. Safdie had indicated that he was not happy with this specification [of smooth form finish for the garden wall] even though he had specified it." Cicuto Affidavit ¶ 55. On July 28, WDJV's Mr. Michalesko requested of GSA's Mr. Hundley that "the design team/owner review the finishes and select which option is preferred." *Id.*, Exhibit B at GSA046230.

On August 8, WDJV sent to MSA request for information (RFI) number 0692: “Please confirm, that per the site visit with Moshe Safdie on Tuesday, August 2, the acid-etched finish is approved for the Precast Gardenwall.” Appeal File, Exhibit 42. Two days later, Ms. Steven answered, “This is correct. The finish at the bottom third of the on-site sample is the approved finish for the Gardenwall precast.” *Id.*

According to Global’s Mr. Cicuto, “Mr. Safdie ultimately requested that Global Precast use an acid etched finish on all of the buildings, not just the ones required in the Specifications.” Cicuto Affidavit ¶ 6. Further, “Moshe Safdie changed the color or face mix design for the project. What began as a required Indiana limestone standard gray color was changed from August of 2004 through about August of 2005 one slow step at a time to a completely different face mix or color and texture.” *Id.* ¶ 7.

The MSA architects provided declarations that include completely different views of what happened. According to each of the architects, “[MSA] did not direct Global Precast to substitute an acid wash finish for the smooth surface finish called for in the specification.” Safdie Declaration ¶ 13; Goeller Declaration ¶ 6; Steven Declaration ¶ 12. GSA’s Mr. Hundley similarly has declared, “The GSA did not request the substitution of the acid washed finish for the smooth surface finish. Global submitted the acid washed finish as an alternative to the contract and the Architect accepted it.” Hundley Declaration ¶ 9. As to the face mix, Mr. Safdie and Ms. Steven state, “The color of each of the samples that Global Precast submitted was acceptable but they had a lack of uniformity and too many black flecks.” Safdie Declaration ¶ 10; Steven Declaration ¶ 9. Further, they say, “We did not request that Global Precast change the materials only that the color be made more uniform and that the many black flecks in the samples be reduced.” Safdie Declaration ¶ 11; Steven Declaration ¶ 10.

On August 10, Gilbane’s Robert Fisher wrote to WDJV, “The Government has reviewed the response to this RFI [number 0692] and has found no cost or schedule impacts to the contract requirements. Should Walsh/Davis disagree, advise the Government in writing to obtain direction prior to proceeding with any associated work.” Appeal File, Exhibit 41.

According to the MSA architects, “During the approval of the finish samples, Global Precast did not advise us that any of the 4 samples would be an additional cost, certainly not the acid-wash finish.” Goeller Declaration ¶ 7; Steven Declaration ¶ 13.

According to Global’s Mr. Cicuto, however, the choice of an acid-wash finish mandated additional costs. He tells us that there are three techniques for finishing precast -- smooth form, acid-washed, and sandblasting -- and among them, “acid washing is the most

labor intensive and the most expensive. Acid washing involves additional handling, crane time and labor, unlike sandblasting and certainly unlike smooth form finish. Acid washing is done in an enclosed highly ventilated area of the plant by highly skilled technicians using great quantities of acid, water and equipment such as pressure washers, brushes and safety equipment.” Cicuto Affidavit ¶ 20.

Global’s Mr. DiVincentiis explains, with regard to the face mix aspect of the claim, “[T]he additional costs incurred reflect the changes in coarse aggregate, fine aggregate, cement, additives and pigment from the costs to meet the color of Indiana limestone standard gray and the final color, known as G715, that Mr. Safdie ordered.” DiVincentiis Affidavit ¶ 15. “The coarse aggregate changed from Duffrin limestone to a co[a]rse aggregate called [Georgian limestone] which has an increased cost per ton. The fine aggregate changed from a universal concrete sand to a tan limestone. That change is an increased material cost. The cement did not change, but the pigment changed, which also was at additional cost.” *Id.* ¶ 16.⁴

On October 20, Mr. Cicuto wrote to WDJV’s Mr. Michalesko:

The 56 calendar day extension to the overall project schedule will have minor cost impact at the tail end of the project other than site labour escalation and labour inefficiencies since erection will extend into the winter months (to be addressed under separate claim) but it is the source of major financial losses at this time.

Respondent’s Response to Appellant’s Cross-Motion for Summary Relief, Exhibit 1 at 1. In this communication, Global made a claim for forty days of production losses at a cost of \$273,053. *Id.* at 3. Global made no mention of the claim that is at issue here.

On December 19, Mr. Michalesko wrote to GSA’s Mr. Hundley regarding negotiations involving “potential costs associated with late precast submittal return,” which he said had been ongoing since May 9. He identified Global’s costs as pertaining to production losses and fuel surcharge on deliveries. This letter, too, made no mention of the claim that is at issue here. The total amount of the claim was \$530,990. Cicuto Affidavit,

⁴ Mr. DiVincentiis’ first affidavit, which is quoted here and elsewhere in this opinion, stated that the coarse aggregate changed to HL3. In a second affidavit, Mr. DiVincentiis states that the reference to HL3 was in error and should have been to Georgian limestone. Second Affidavit of Donny DiVincentiis (June 3, 2010) ¶ 2.

Exhibit B at GSA051788-89. Mr. Hundley denied this claim on February 6, 2006. *Id.* at GSA103234.

On March 13, 2006, Mr. Michalesko wrote to Mr. Hundley:

During a meeting held with Global Precast on March 8, 2006, Walsh/Davis was informed of Global's formal intent to seek compensation for the finish of the precast garden wall. The original design of the garden wall called for a form finish. Per the attached RFI #692, Global is providing an acid etched finish matching the building per the architect's request. This finish is an extra cost and outside the original scope of work.

Appeal File, Exhibit 44.

Mr. Hundley responded on April 17:

Your request for additional compensation is rejected. In accordance with the accepted Contract Alternate No. 1, "If this alternate is accepted, provide garden wall constructed of Architectural precast concrete, designated as PC-1 (*smooth finish*)."

Submittal 0011-03450-00 was submitted and rejected and additional sample submittals requested due to the issues with color and texture imperfections. Global Precast then submitted an acid etched finish as the solution to the consistency problems. This sample was accepted per RFI #692 and the August 2, 2005 site visit with Moshe Safdie to meet contract compliance.

Appeal File, Exhibit 47. Mr. Hundley explained further in a declaration submitted with GSA's motion for summary relief:

Although GSA did not desire the change to acid washed finish, it decided to accept it for practical reasons. The acceptance, however, does not mean that GSA acknowledged the substitution as a compensable change. By the time WD[JV] provided the notice of cost on March 13, 2006, it was impractical to restart the review process for the selection of the smooth surface finish for the garden wall. Considering the cost already incurred in fabricating the acid washed legs for the garden wall, the garden wall being a critical element for substantial completion, and the 1st installation to be on May 1, 2006; I did not stop WD[JV] from continuing with the substitution of the acid washed finish for the smooth surface finish.

Hundley Declaration ¶ 10.

With regard to Mr. Hundley's rationale, Global's Mr. DiVincentiis says that he performed an exhaustive study of his company's manufacturing records for this project and determined that 87.8% of the precast panels used on the job were manufactured after March 13, 2006, the date on which WDJV told GSA to anticipate the claim that is at issue here. DiVincentiis Affidavit ¶¶ 27-33, Exhibit A.

WDJV's direct cost claim on behalf of Global originally included amounts for changes in the finish and the mix of the precast concrete. WDJV alleged:

GSA directed a change in the finish required for the precast panels on the Garden Wall as well as Buildings D, E, F, and G, the guardhouse, entryway, and credit union. The GSA directed that the finish be changed from the grey concrete smooth finish set forth in the contract documents to a mix design finish with G715 face mix and an acid wash finish.

Appeal File, Exhibit 3 at 202. The claim consisted of the following amounts:

Garden wall:

Additional cost of G715 face mix	\$152,038.43
Additional cost of acid wash finish	<u>163,290.00</u>
Total	\$315,328.43

Buildings D, E, F, and G, guardhouse, entryway, and credit union:

Additional cost of G715 face mix	\$ 59,664.20
Additional cost of acid wash finish	<u>72,410.00</u>
Total	\$132,074.20

Additional costs	\$447,402.63
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10% overhead	44,740.27
10% profit	<u>49,214.29</u>

Total additional costs	\$541,357.19
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Id. at 202-03.

Although the GSA contracting officer wrote a 123-page decision on WDJV's overall claim, and addressed in that decision four claims brought on behalf of Global, the decision

does not address the claim with which we are concerned here. Notice of Appeal, Attachment, especially at 74-77. Consequently, the claim is deemed to have been denied. 41 U.S.C. § 605(c)(5) (2006).

This claim has undergone various permutations over time. As most recently stated, it is as follows:

Face mix claim	
Buildings A, B, and C	\$ 85,294.67
Garden Wall	99,543.00
Buildings D, E, F, and G and one-story building	16,656.00
Acid etch claim	
Garden Wall	\$176,996.40
Buildings D, E, F, and G and one-story building	56,969.00
Total	\$435,459.07
10% overhead	43,545.91
10% margin	47,900.50
Total claim	\$526,905.48

Letter from Edward J. Sheats, Jr., to Board (Feb. 3, 2010).

Discussion

The parties have very different views of the matters at issue. According to WDJV, GSA's architect, MSA, directed significant changes to the color of the precast's face mix -- from Indiana limestone standard gray to G715. The contractor asserts that the architect also directed a significant change to the finish of the precast on various parts of the project -- the garden wall; Buildings D, E, F, and G; and the one-story building -- from smooth form to acid-etched. WDJV maintains that each of these changes imposed additional costs on subcontractor Global -- the face mix had to be made from more expensive materials, and the finish was more expensive to create because it entailed additional labor and materials. WDJV says that it alerted GSA to the impact of the changes well before March 13, 2006. Even if March 13 is considered to be the first notification of a claim, the contractor maintains, because little of the precast was manufactured prior to that date, if GSA wanted to countermand the architect's direction on March 13, and avoid the additional costs, it could have done so. WDJV acknowledges that its claim submission to the contracting officer did

not specifically reference Buildings A, B, and C, but says that the claim as to the change in face mix necessarily involves the precast on those buildings because the face mix on the entire project had to be uniform.

According to GSA, the architect consistently objected not to the color of precast samples, but rather, to their consistency. The color of the face mix ultimately used in the precast was similar to the sample provided to the contractor, says the agency, and because the color did not change, an adjustment to the contract price is not warranted for the face mix. GSA additionally asserts that the contract calls for white cement in the precast and that the claim is predicated on the use of gray cement. GSA maintains that the change in finish from smooth form to acid-etched was a voluntary, business decision made by Global; the change was not desired, requested, or authorized by the agency. Further, GSA says, it told WDJV that it should advise the agency, before beginning work on the precast, if the contractor believed that the change in finish would result in additional cost -- and WDJV remained mute until after much of the precast had been fabricated, at which time the agency had no choice but to allow the contractor to continue with the substitution. GSA finally urges that because the claim presented to the contracting officer does not mention the face mix on Buildings A, B, and C, the Board lacks jurisdiction to consider the portion of the claim which now involves those buildings.

On cross-motions for summary relief, we can dispose of one minor contention made by each party. WDJV is not correct in asserting that it alerted GSA to the purported cost impact of the purported changes prior to March 13, 2006. The communications which the contractor calls to our attention addressed other matters: A letter of July 28, 2005, from WDJV to GSA merely asked for direction as to what finishes to employ. A letter of October 20, 2005, from Global to WDJV alleged a cost impact from a delay in the project (something about which WDJV warned GSA back on April 6, 2005). A letter of December 19, 2005, from WDJV to GSA made a claim on Global's behalf for production losses and a fuel surcharge on deliveries. We conclude that WDJV's letter to GSA on March 13, 2006, represented the first instance in which Global claimed additional costs resulting from changes in the face mix and finish of the precast.

GSA is not correct in thinking that the claim is predicated on the notion that the agency mandated a change in the color of cement from white to gray. There is no indication in the record presented to us that Global or WDJV ever thought that the color of the cement was altered from the "100% White" specified in the contract. It is true (but irrelevant) that in July 2004, WDJV made a recommendation that the color be changed, to save the Government \$180,000. Appeal File, Exhibit 12 at 1. This recommendation was rejected, however, with the note, "MSA - This is not an option." *Id.* at 3. After that, the contractor understood that white cement was required; indeed, in its explanation of the face mix claim,

Global says that “[t]he cement did not change.” Cement, however, is only one ingredient of precast concrete. It is the *concrete* whose color is alleged to have been changed by the architect, speaking for the agency.

On the more important issues, the parties are in hopeless disagreement as to the facts. With regard to the face mix portion of the claim, the individuals who appear to have most knowledge of the matter have given us sworn affidavits or declarations containing opposite conclusions. According to the MSA architects who evaluated the samples prepared by Global, the G715 face mix that was approved is “remarkably similar” to the Indiana standard gray sample that Global was supposed to match. According to the head of Global’s manufacturing operations, however, G715 did not match the sample. Because we cannot weigh or evaluate the evidence at this stage of the proceedings, we cannot now say which of these statements is correct. GSA appears to recognize the conflict in the statements; it suggests that to determine which is correct, we “undertake a site visit to the ATF [Bureau of Alcohol, Tobacco, Firearms and Explosives] Building in Washington DC to compare the acid washed finish on the walls there with the sample Indiana standard gray sample, which GSA has in its possession.” Response to Appellant’s Motion for Summary Relief at 5 n.2. Plainly, such a visit would be inappropriate at the summary relief stage because its purpose would be to make a finding of fact.⁵

The comments made by the architects as to the samples submitted by Global can be read to support each party’s view of why samples were rejected -- because of their color (as WDJV sees the matter) or their consistency (as GSA sees it). On November 16, 2005, Ms. Steven said the color needed to be “‘warmed up’ a bit and made lighter, but also that it needed to be “more uniform” and have “less visible black flecks.” She made similar comments on December 2, 2005, and February 16, 2006. On February 15, Mr. Safdie thought a sample “might be too dark” and that he wanted to see samples that “should range from light, almost like Savannah, and with two positions going darker.” On February 28, Ms. Steven said that she liked “the range of whiteness” on the samples, but that Mr. Safdie thought the samples were “very sterile and cold” and needed to have the gray pigment reduced and “cream/peach tones” introduced to add brightness. On March 15, she wrote that she was “pleased to see the tonal range.” Most of these comments show a changing disposition of the architects as to what color the precast should be. Some of the comments, however, show disappointment with the uniformity and black flecks in the samples. As GSA

⁵ Even if we were able to evaluate the evidence, such a visit might not be helpful. According to Global’s Mr. Cicuto, “as the precast has been installed and ‘weathered’ for five years, the color comparison is not valid.” Second Affidavit of Peter Cicuto (June 3, 2010) ¶ 7.

points out, the contract directed the contractor, “[i]f requested by the Architect, [to] adjust the pigment color of the panels before proceedings with the mockups.” Whether the architect exercised this authority in a reasonable fashion, however, is open to doubt based on the information we have at this time.

Resolution of the other portion of WDJV’s claim, regarding the finish of the precast, is similarly stymied by contradictory affidavits and declarations. According to Global’s Mr. Cicuto, MSA’s “Mr. Safdie ultimately requested that Global Precast use an acid etched finish on all of the buildings, not just the ones required in the Specifications.” According to the MSA architects, however, they did not direct the contractor to substitute an acid-etched finish for the smooth form finish required for some of the buildings; the substitution was Global’s idea. Because we cannot weigh the evidence at this stage of the proceedings, we cannot now decide which of the statements is correct.

There are additional complications to the finish aspect of the claim, as well. On August 8, 2005, MSA’s Ms. Steven told WDJV that the acid-etched finish “is the approved finish for the Gardenwall precast.” Two days later, an employee of the construction manager, Gilbane, told the contractor that this statement was found to have “no cost or schedule impacts to the contract requirements. Should Walsh/Davis disagree, advise the Government in writing to obtain direction prior to proceeding with any associated work.” These communications appear to be potentially at odds with each other -- one directing the contractor to deviate from the contract’s specifications and the other making the deviation contingent on a later directive if a cost impact would result. Both of the communications -- one from the architect and one from the construction manager -- came from contractors. Which of these contractors (if either) spoke for GSA, the owner of the property? We have been provided no information as to authority delegated to either of them from the contracting officer. The only hint we have comes from Global’s Mr. Cicuto, who says that GSA project manager Hundley “was . . . rarely active in the decision making and effectively delegated the decision making for the precast to Moshe Safdie.” Cicuto Affidavit ¶ 57.

Mr. Hundley eventually denied the claim, but we know from his own statement that he had no authority to do so because his authority extended only to “change order directives for amounts up to \$450,000.00” and this claim was at all times greater than that amount.⁶ The contracting officer himself has never spoken to the claim. The parties should address the issue of actual or implied authority as they present the case to us on the merits, as that

⁶ This limitation does not seem to have troubled Mr. Hundley. He also denied WDJV’s claim for Global’s production losses and fuel surcharges, which, too, was in an amount greater than \$450,000.

issue may be important. *See Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007). We will also need to understand whether the architect's direction pertained to the garden wall alone (as the response to WDJV's request for information states) or to the entire project (as indicated in Mr. Cicuto's affidavit and apparently assumed in the motions and oppositions).

If Gilbane's letter is found to have placed a contingency on MSA's direction, we will need to explore another issue as well. WDJV did not inform GSA until nearly seven months after the letter was written that a cost impact would result from the change in the finish of the precast on some of the buildings. GSA believes that this delay is fatal to the claim. The agency finds great support for this belief in a statement of the Court of Federal Claims (then called the United States Claims Court) in *Calfon Construction Inc. v. United States*, 18 Cl. Ct. 426 (1989), *aff'd*, 923 F.2d 872 (Fed. Cir. 1990) (table): "[T]here is but one overriding legal principle: Written notice as to constructive changes must be supplied by the contractor before such time that the Government would suffer if not apprised of the facts." *Id.* at 438. The final phrase of this sentence, "before such time that the Government would suffer if not apprised of the facts," required further explanation from the court, however:

In some instances immediate notice from the contractor is of minimal benefit, and the Government suffers no prejudice from not having had written notice at the time the constructive change occurs. For example, if the contracting officer deliberately gives the contractor an oral direction to proceed in [a] manner different [from] that outlined in the specifications, with knowledge of the probable results, the notification requirement has not been enforced strictly.

Id.; *see also AAB Joint Venture v. United States*, 75 Fed. Cl. 414, 424 (2007).

Whether such an instance occurred here is not clear. We read the affidavit by Global's Mr. Cicuto to say that anyone with any knowledge of construction using precast concrete would understand that an acid-etched finish is more expensive than a smooth form finish. If this is so, the lack of prompt notice was not prejudicial to GSA because the architect's direction mandated what should have been recognized as additional costs. Also, we note the disagreement between Global's Mr. DiVincentiis and GSA's Mr. Hundley as to the quantity of precast manufactured by the date when notice was given. If Mr. DiVincentiis is correct, the lack of prompt notice may not have been prejudicial because so little had been manufactured by that date.

We turn now to GSA's request that we dismiss part of the current claim for lack of jurisdiction. In making its initial claim regarding the face mix, WDJV alleged changes

impacting costs in constructing precast for the garden wall; Buildings D, E, F, and G; a guardhouse; an entryway; and a credit union. In asking the Board to award damages, the contractor alleges that the changes impacted the garden wall; Buildings A, B, C, D, E, F, and G; and a one-story building. As GSA observes, the claim presented to the contracting officer did not mention Buildings A, B, and C. What implications does this fact have for our ability to consider the claim as to those buildings?

The Contract Disputes Act requires that “[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 605(a). The Court of Appeals for the Federal Circuit has held that “a final decision by the contracting officer on a claim . . . is a ‘jurisdictional prerequisite’ to further legal action thereon.” *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *see also England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Bowers Investment Co. v. Department of Transportation*, CBCA 825, 08-1 BCA ¶ 33,783, at 167,202 (implementing court’s holding). GSA maintains that because Buildings A, B, and C were not mentioned in the claim presented to the contracting officer, and the Board may consider only claims which were so presented, we have no jurisdiction to consider the portion of the face mix claim that pertains to those buildings. *See Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987).

Whether a matter placed before a board of contract appeals is a new claim or part of the claim which was presented to the contracting officer turns on whether the matter raised before the Board differs from the essential nature or the basic operative facts of the original claim. *North Wind, Inc. v. Department of Agriculture*, CBCA 1779, 10-1 BCA ¶ 34,419, at 169,904; *Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,771; *Stroh Corp. v. General Services Administration*, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,130; *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000). The gravamen of the face mix claim is that GSA directed a change in the mix, resulting in the use of more expensive materials than would have been necessary to produce the color originally specified for the precast concrete. The same face mix was required for all portions of the project. Thus, the face mix claim as to Buildings A, B, and C will succeed or fail based on an analysis of the same facts that we will have to analyze to determine whether the face mix claim as to the remainder of the project succeeds or fails. If the contractor prevails as a result of this analysis, its recovery will differ only in the measure of damages if use of the face mix for the precast on Buildings A, B, and C is considered. This is a permissible change in the claim, one that does not deprive us of jurisdiction to hear this aspect of it. *Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984).

A final note for the parties to consider as they proceed with the case: WDJV asserts that GSA has stipulated as to damages and that only entitlement is at issue. GSA, in its response to WDJV's cross-motion for summary relief, at pages 12-13, explains that its stipulation as to damages is limited. The stipulation applies only to the money Global claimed to have spent on the face mix and what Global alleges it spent on the acid-washed finish for the garden wall and buildings D, E, F, and G. GSA maintains that if the Board finds for WDJV on the finish claim, we would have to deduct from Global's costs what the subcontractor would have spent to bring a smooth form finish into compliance with contract requirements. Further, GSA says that its stipulation does not extend to the \$85,294.67 claimed as additional costs of the face mix for Buildings A, B, and C. Clearly, if WDJV persuades us that it is entitled to recover damages, the amount of those damages will have to be proved.

Decision

The parties' **CROSS-MOTIONS FOR SUMMARY RELIEF** are **DENIED**. GSA's **MOTION TO DISMISS** a portion of the case **FOR LACK OF JURISDICTION** is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge